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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NAGESH SHETTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should the Court resolve a conflict in the Circuits over whether, under the Speedy Trial Act, a defendant waives his right to a speedy trial by consenting to a continuance sought by the court or the government?

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OPINIONS BELOW

The opinion by the Court of Appeals for the Ninth Circuit is reported at 130 F.3d 1324 (9th Cir. 1997) and is set forth in the appendix at App. 1. The order denying the petition for rehearing is unpublished and is set forth in the appendix at App. 27. The Opinion of the United States District Court for the Central District of California is unreported and is set forth in the appendix at App. 29.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 20, 1997. A timely petition for rehearing was denied by order entered February 3, . 1998. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

See Appendix at App. 46.

STATEMENT OF THE CASE

Defendant Dr. Nagesh Shetty was indicted on December 1, 1994 on three counts of violating 26 U.S.C. § 7206(1) by filing false tax returns. He first appeared before a judicial officer on December 7, 1994. His trial commenced on June 11, 1996, 551 days later. Before trial, Dr. Shetty moved to dismiss the indictment on the ground that his right to a speedy trial pursuant to the Speedy Trial Act of 1974, 18 U.S.C § 3161, et seq. (the "Act"), was violated by the excessive delay in bringing him to trial. His motion was

denied. (App. 29)

The Ninth Circuit affirmed Dr. Shetty's conviction. (App. 1) In essence, the Ninth Circuit, in a decision that conflicts with decisions of the Fourth and Fifth Circuit, held that Dr. Shetty waived his statutory speedy trial rights by consenting to adjournments sought by the court and the government.

This case, therefore, raises the important question of who bears the ultimate responsibility for ensuring that the requirements of the Speedy Trial Act are followed, and whether a district court can circumvent those requirements by insisting that a defendant consent to adjournments that are sought by the court or the government.

The Speedy Trial Act provides that a trial must commence within 70 days of the date when a defendant first appears before a judicial officer. 18 U.S.C. § 3161(c)(1). The Act contains narrow, automatic exclusions from its time limits and also permits a trial court discretion to continue a trial if "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A).

In this case, the government conceded, and the District Court found, that sixty-one of the 551 days between arraignment and trial were not excludable under the Act. (RE 171; CR 95, p.47) Thus, if an additional ten days were also not excludable, Dr. Shetty's motion to dismiss the indictment on speedy trial grounds should have been granted.

Every continuance that was granted in this case (other than the 61 days of undisputed non-excludable time) was covered by a stipulation drafted by the government and signed by the parties and their counsel. After the parties signed a stipulation, the District Court entered an order finding that the time covered by the stipulation was excludable under the Act, usually pursuant to the "ends of justice" provision.

Dr. Shetty did not challenge any continuances he himself sought.[1] He only challenged continuances prompted: (1) by the court's insistence that the trial be postponed to accommodate its own calendar; or (2) at the government's request, in one instance, because a government witness had scheduled elective surgery at a time that conflicted with a previously scheduled trial date.

Three of these continuances stand out as being entirely unjustified.

1. The Period From September 12, 1995 To October 3, 1995

On May 22, 1995, during a telephone conference that was not recorded, the government sought a continuance of the June 6, 1995 trial date. (RE 158, 190-91; CR 95, pp. 34, 66-67). According to the

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[1] At the beginning of the case, Dr. Shetty sought two continuances to retain counsel and to give counsel time to prepare. In December, 1995, after he was hospitalized for chest pains, Dr. Shetty sought a continuance. He twice thereafter sought continuances because of his heart condition. (RE 5, 9, 38-53)

minutes prepared by the court, which are the only contemporaneous record of the conference, the court granted the government's request, "in light of government counsel's illness and without objection by defendant." (RE 13; CR 25) The minute order set a status conference for September 11, 1995, but scheduled the trial for October 3, 1995, 21 days later, explaining that October 3d was the court's "next available trial date." The order did not reflect that Dr. Shetty requested a continuance for any reason. (RE 13; CR 23)

As was the practice in this case, after the conference, the government drafted a stipulation that purported to incorporate the matters discussed at the conference. (RE 14; CR 24, p 2) On June 13, 1995, the court entered an order excluding the time from June 6, 1995 to October 3, 1995, pursuant to the "ends of justice" provision. The order stated that "government counsel has requested a continuance of trial due to her medical condition which prohibits her from trying the case on the currently scheduled date," and that "defendant stipulates to a continuance of trial, based, in part on the recent association into the defense case of additional counsel." The order then reiterated that a status conference would be held on September 11, 1995, but that the trial would not commence until October 3, 1995 --the "court's next available trial date." (RE 17; CR 25)

On appeal, Dr. Shetty specifically challenged the 21 day delay between the status conference, when the parties were ready to proceed, and the scheduled trial date. Although the Ninth Circuit acknowledged that calendar congestion is not a legitimate basis for excluding time

under the Act, it held that the 21 days were excludable because "there [was] no indication the defense requested an earlier date or withdrew its stipulation to continue the trial to October 3, 1995." (App. 11)

2. The Period From October 3, 1995 To November 28, 1995

The trial did not take place on October 3, 1995, as scheduled. At the status conference on September 11, 1995, the court indicated that it would be starting another trial before October 3d, and that the Shetty trial would have to be placed on "trailing" status. Since the court anticipated a further delay, counsel for both sides took out their calendars, and inevitable scheduling conflicts emerged. The government, for example, had a witness who was going on vacation from October 10, 1995 to October 24, 1995, and government counsel was scheduled to begin another trial on October 17, 1995. (RE 19-29; CR 34)

After the conference, when the court confirmed its own unavailability on October 3d, the government prepared a stipulation rescheduling the trial for November 28, 1995, and the court entered an order of excludable time. (RE 30-35; CR 36, pp. 1-5)

On appeal, Dr. Shetty argued that the postponement of the October 3d trial date because of the court's scheduling conflict precipitated the delay, so any time attributable to the conflicts that emerged when the trial was put off was not excludable. The Ninth Circuit rejected this argument on the ground that "both Shetty and his counsel stipulated to the

facts underlying the district court's findings of excludable time, and at no time, either orally or in writing, did they attempt to withdraw their stipulation and/or request an earlier trial date between October 3 and November 28." (App. 13)

3. The Period From April 16, 1996 To June 11, 1996

In December, 1995, Dr. Shetty was hospitalized for chest pains. He sought a continuance and thereafter sought two additional continuances, which were granted only upon the introduction of medical documentation of Dr. Shetty's heart condition. (RE 5, 9, 38-53; CR 60, 64, 65)

The trial was set for April 16, 1996. Shortly before a status conference scheduled for April 4th, the government moved for permission to take a deposition of a government witness, Connie Hansen, and to use that deposition at trial in place of Ms. Hansen's face-to-face testimony. The government claimed that Ms. Hansen had scheduled surgery that would conflict with the trial date and that the surgery would require a 6-8 week recuperation period. (RE 62, 66, 80; CR 73, pp. 8, 12, 26)

At the April 4th status conference, it emerged that Ms. Hansen's surgery was elective, and that Ms. Hansen had a financial, not a medical reason, for undergoing surgery at the time of the trial. Dr. Shetty objected to the introduction of Ms. Hansen's testimony through a deposition on the ground that his confrontation rights would be violated. (RE 59-62, 66; CR 73, pp. 5-12)

The court seemed inclined to agree, and questioned the government about its need for Ms. Hansen. The government asserted that Ms. Hansen was relevant, but, when the court suggested postponing the trial to accommodate Ms. Hansen, the government adamantly asserted that it was not requesting a continuance based on Ms. Hansen's unavailability -- that it would "proceed to trial without [Ms. Hansen] as a witness." Defense counsel, too, represented that, while confrontation of the witness was critical, Dr. Shetty had no intention of calling Ms. Hansen as a witness. (RE 59-62, 65, 69, 82; CR. 73, pp. 5-6, 8-12, 14)

Neither party sought to put off the trial date because of Ms. Hansen. However, the court indicated that, because of its own scheduling conflict, it would be preferable to postpone the trial, that a June date would "be probably easier to juggle," and would "be wonderful probably in terms of the Court's calendar." (RE 76; CR 73) The government was justifiably concerned that any further continuance would violate the Speedy Trial Act.

> I'm concerned we don't have excludable time. I think when I look at that provision, it does not appear that the government needs to make a request for a continuance. But I'm concerned. We just can't stipulate under the Speedy Trial Act. There has to be a legitimate period of excludable time. We have approximately three days left.
>
> I would seek to proceed on April 16th than obtain the continuance.

(RE 88-89; CR 73, pp. 34-35)

Nevertheless, the court decided to "continue this matter to June," and counsel, faced with a virtual fait accompli, agreed to the postponement. (RE 90, 92-93; CR 73, pp. 36, 38-39)[2]

Once again, the government drafted the requisite stipulation, purporting to memorialize the status conference, and attributing the delay to, among other factors, the "unavailability" of "an essential witness." The stipulation was signed by counsel and the parties, and incorporated into an excludable time order by the court. (RE 105-108; CR 77, pp. 1-4; CR 78)

On appeal, Dr. Shetty argued that there were no statutory grounds for granting a continuance to accommodate Ms. Hansen since she was neither "essential" nor "unavailable," and that any delay occasioned by the Ms. Hansen episode was not excludable.[3] The Ninth Circuit

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[2] At the conclusion of the conference, Dr. Shetty expressed in no uncertain terms his readiness to go to trial: "we are ready to go for trial, we have been ready to go for trial." (RE 100; CR 73, p.46)

[3] Although the Act provides for a statutory exclusion for "delay resulting from the ... unavailability of an essential witness," 18 U.S.C. § 3161(h)(3)(A), the government did not claim that Ms. Hansen was an "essential" witness, and the court itself held that she could be "available." As the court put it, "It's just a matter of timing. The reason that renders the witness unavailable is her own personal

disagreed, both because Dr. Shetty did not object to the continuance, and because "after Shetty and his counsel stipulated to the facts underlying the district court's findings of excludable time, at no time, either orally or in writing, did the defense attempt to withdraw its stipulation or request a trial date earlier than June 10, 1996." (App. 15)

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHETHER A DEFENDANT CAN WAIVE THE TIME RESTRICTIONS OF THE SPEEDY TRIAL ACT BY CONSENTING TO A CONTINUANCE

Congress enacted the Speedy Trial Act in order to give "real meaning" to the speedy trial right secured by the Sixth Amendment. 1974 U.S. Code Cong. & Adm. News 7401, 7404. By setting strict time limits by which a defendant must be brought to trial, the Act limited the period a defendant must suffer the "magnitude of disabilities" endured by an individual awaiting a criminal trial. Id. at 7408.

The Act requires that a trial commence within seventy days from the date on which the defendant first appears before a judicial officer, barring periods of excludable delay. 18 U.S.C. § 3161(c)(1). If the defendant is not brought to trial within the time limits set by the Act, the indictment "shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2).

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choice." (RE 90, 92-93; CR 73, pp. 36, 38-39)

In this case, Dr. Shetty's trial commenced 551 days after the date of his arraignment. Part of this extraordinary delay was attributable to the district court's insistence on at least three occasions that the trial be postponed to accommodate its own calendar. The court was able to secure the defendant's consent to each of these adjournments. This case poses the critical question of whether, by obtaining the defendant's consent, a district court can circumvent the time limitations set forth in the Act.

Most of the courts are in theoretical agreement that a defendant cannot waive his right to a speedy trial.[4] The courts, however, are in conflict over what that general principle means.

In this case, the Ninth Circuit held that a defendant's consent to a continuance sought by the court or the government necessarily results in excludable time, regardless of whether the time is properly excludable under the Act. Put another way, the Ninth Circuit adopted the view that a

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[4] Several Circuits have stated that, in general, a defendant cannot waive his right to a speedy trial. See, e.g., United States v. Kucik, 909 F.2d 206, 210-11, & n.4 (7th Cir. 1990), cert. denied, 498 U.S. 1070 (1991); United States v. Willis, 958 F.2d 60, 63 (5th Cir. 1992); United States v. Berberian, 851 F.2d 236, 239 (9th Cir. 1988), cert. denied, 489 U.S. 1096 (9th Cir. 1989); United States v. Ray, 768 F.2d 991, 998 n.11 (8th Cir. 1985); United States v. Pringle, 751 F.2d 419, 434-35 (1st Cir. 1984); United States v. Carrasquillo, 667 F.2d 382, 388-90 (3d Cir. 1981).

defendant can indeed waive the requirements of the Act by the simple expedient of agreeing to a continuance.

By qualifying the "no waiver" rule, the Ninth Circuit aligned itself with decisions of the First and Seventh Circuit, both of which have held that a defendant cannot later object to an adjournment to which he has consented, even if the delay would not otherwise result in excludable time under the Act. United States v. Kucik, 909 F.2d 206, 210-11 (7th Cir. 1990), cert. denied, 498 U.S. 1070 (1991); United States v. Pringle, 751 F.2d 419, 433 (1st Cir. 1984).

In contrast, the Fourth and the Fifth Circuits, recognizing that the Speedy Trial Act protects not only the defendant, but also society's interest in speedy justice, have held that a defendant's acquiescence in a continuance sought by the court or the government will not result in excludable time if the time is not otherwise excludable under the Act. United States v. Keith, 42 F.3d 238 (4th Cir. 1994); United States v. Willis, 958 F.2d 60 (5th Cir. 1992).

The differences in the two positions are striking, as this case amply demonstrates.

Although the Act explicitly provides that "no continuance ... shall be granted because of general congestion of the court's calendar," 18 U.S.C. § 3161(8)(C), here, the court twice postponed the trial date because of calendar congestion. Yet, because the court was able to secure the defendant's consent, the statutory restrictions were simply ignored.

The court also directed that the trial be put off because of Ms. Hansen's surgery, even though the government refused to characterize her testimony as "essential," and even though the court itself found that she could be "available." In the Ninth Circuit's words, because "Shetty never objected to [the] continuance" and "personally, and through counsel, stipulated to the facts underlying ... the district court's findings of excludable time" (App. 18), the absence of any legitimate factual basis for the adjournment was treated as irrelevant.

The rule announced in this case means that any time the defendant stipulates to a continuance, no matter how unjustified, the period of time is excludable. But, as the Fourth Circuit remarked in rejecting just such a rule, it:

> would appear to find a waiver when a defendant consents to a continuance occasioned on <u>any</u> reason, including the district judge's desire to go fishing. Such an approach is clearly inconsistent with the Act.

<u>Keith</u>, 42 F.3d at 239.

The First, Seventh, and Ninth Circuits treat the defendant's consent as the dispositive issue in evaluating whether time is excludable under the Act. This approach fails to recognize the compelling policy reasons for requiring the court to look behind the defendant's consent and examine the underlying facts. As the Fifth Circuit, adopting a contrary rule, has explained, speedy trial waivers are unenforceable because they undermine society's interest in a speedy trial:

> The Act is intended both to protect he defendant from undue delay in his trial and to benefit the public by ensuring that criminal trials are quickly resolved. Allowing the defendant to waive the Act's provisions would compromise the public interest in speedy justice.

Willis, 958 F.2d at 63. See also 1974 U.S. Code Cong. & Adm. News at 7408 ("The Committee believes that the right to a speedy trial belongs, not only to the defendant, but to society as well.")

The Circuits also have conflicting views on whether a defendant who consents to a continuance and later seeks to assert his speedy trial rights has abused the Act and should be penalized. In this case, Dr. Shetty did not contest any continuances he sought, limiting his objections to continuances that were unjustified under the Act and that were insisted on by the court or sought by the government. Nevertheless, the Ninth Circuit viewed his consent and later objection as a strategic tactic that could not be tolerated.

The Fifth Circuit, in contrast, aptly explained the difference between a defendant who induces the court to misapply the Act and then relies on the court's error, and a defendant, like Dr. Shetty, who does nothing more than agree to a continuance:

> A district court is not sandbagged or otherwise misled ... by a defendant's simple request for or acquiescence in a continuance and its own

> insistence upon a waiver. Our holding that the provisions of the Act are non-waivable would be meaningless if we adopted the rule that the defendant waives his ability to move for dismissal of the indictment simply by asking for or agreeing to a continuance. It is the responsibility of the district court to ensure that a request for a continuance in a trial past the 70-day mark falls within one of the Act's exceptions.

Willis, 958 F.2d at 64.

The rule of the First, Seventh and Ninth Circuits, in effect, allows a case to drag on indefinitely, provided defense counsel and defendant consent. It disregards the public's interest in a speedy trial, the district court's power to compel the parties to "stipulate" to facts in order to justify delays that are sought by the court, and the importance of a speedy trial to a defendant, who may perceive that he has no choice but to accede to continuances being sought by the government or the court.

Plainly, whether a defendant's simple consent to an adjournment is sufficient to render the time excludable is a question likely to recur. The district court will almost always be able to convince the defendant to agree to a continuance sought by the court. If that consent is sufficient to stop the speedy trial clock, then the judiciary holds the power to effectively abrogate the Speedy Trial Act's carefully structured legislative design.

The First, Seventh and Ninth Circuits' rule allowing a defendant to waive the Act's requirements sends exactly the wrong message to the government and to the lower courts. Certiorari should be granted to correct this manifestly erroneous view of the Speedy Trial Act and to ensure uniformity in the decisions of the Circuits on this extremely important issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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